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109-216

BRIEF FOR PLAINTIFF IN ERROR.

Supreme Court of the United States.

No. 303.

SALMON S. MATHEWS, PLAINTIFF IN ERROR,

vs.

THADDEUS DENSMORE, ELISHA P. GROW, AND DEWITT GROW.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

DON M. DICKINSON, Attorney for Plaintiff in Error.

H. P. HENDERSON, Attorney for Defendants in Error.

Supreme Court of the United States.

SALMON S. MATTHEWS, PLAINTIFF IN ERROR,

vs.

THADDEUS DENSMORE, ELISHA P. GROW, AND DEWITT GROW.

IN ERROR TO THE SUPREME COURT OF MICHIGAN.

STATEMENT OF CASE.

Simons, Hatch & Whitten, citizens of Boston, Massachusetts, a Mercantile Copartnership, sued Gates & Marler, a copartnership, citizens of Michigan, in the United States Circuit Court for the Eastern District of Michigan, in assumpsit, filing and serving declaration as commencement of suit. After commencement of suit and before judgment, the plaintiffs caused a writ of attachment to be issued in the same suit from the said United States Circuit Court, commanding the United States Marshal of said District, among other things, to seize the goods and chattels of the defendants, Gates & Marler, amounting to the sum of five hundred dollars and upwards, and safely keep the same to satisfy any judgment that may be recovered by said plaintiffs in said suit against the said defendants and return the writ with his doings thereon before the judges of said court at a certain time therein specified; which writ duly signed, sealed and tested, by the Clerk of the United States Circuit Court for the Eastern District of Michigan, was duly delivered to Salmon S. Matthews (Plaintiff in error), the United States Marshal of said district, who executed the writ by seizing under and by virtue thereof, certain goods and chattels as the property of said defendants, Gates & Marler, and made due return thereof to said court. Thaddeus Densmore, Elisha P. Grow and DeWitt Grow, defendants in

error, thereupon sued the plaintiff in error for taking the goods in question, in a plea of trespass, in the Circuit Court for the county of Ingham, in the State of Michigan, alleging in the declaration that he seized and carried away certain goods of theirs and disposed of the same to his own use. He plead the general issue, giving notice under such plea that he would show that he took the goods in question as United States Marshal of said district, under and by virtue of a writ of attachment issued from the United States Court in the suit of said Simons, Hatch & Whitten vs. Frank Gates and Thomas Marler, and further that said goods were then and there subject to seizure under said writ; that said goods were then and there subject to levy as of the property of said defendants, Gates and Marler, and were within the jurisdiction of said United States Circuit Court. The issue came on for trial before a Jury, in the Circuit Court for the county of Ingham. Defendants in error claimed that when the marshal seized the said goods and chattels they were in possession of them under two chattel mortgages, which they put in evidence having the signature of Frank Gates but without any signature by or in the partnership name; that the marshal inventoried, appraised and took away the goods; that the value of the goods as shown by such appraisal was $829.94; that the goods were worth that amount; that the interest on that amount was as then computed $46.10; that the goods in question had been turned over to them by Frank Gates under his mortgages given for his individual debts to them and they had advertised them for sale under said mortgages. No evidence was introduced by the defendants in error showing or tending to show what their possession was or whether if their possession was rightful as against the defendants in the writ of attachment.

The plaintiff in error in his own defence offered in evidence a writ of attachment; the defendants in error admitted that he was the United States Marshal for the Eastern District of Michigan referred to in the writ but interposed several objections to the writ which were stated by their counsel below as follows, viz.:—1. That the affidavit, which was filed at the time the writ issued, does not allege or show that any sum whatever is due. 2. That the affidavit does not show that the sum of one hundred dollars is due. 3. That the affidavit does not show that there was five hundred dollars due over and above all set offs. 4. That the writ does not recite the

commencement of suit. 5. There is no proof of the commencement of suit. 6. There is no command in the writ to summon the defendants or either of them. All of which objections were sustained by the Judge at the trial and the process under which the marshal seized the goods was rejected; his counsel then offered some evidence which was ruled out tending to show the fact of the partnership between Gates & Marler, the defendants in the writ of attachment, and some evidence tending to show their possession, ownership and right of possession of the goods in question; material evidence to show dealings with that partnership of Gates and Marler, and that plaintiff Densmore was assisting in their store, and that said Frank Gates advertised the copartnership, was all ruled out on objection of defendants in error. This evidence, as was stated by counsel for the marshal, was offered for the purpose of showing that the goods belonged to the the partnership of Gates and Marler, defendants in the writ, and were not covered by the mortgages, and that Frank Gates' only interest in the goods was that of a partner in the firm of Gates and Marler, with a view of showing that plaintiffs were never possessed as of their own property, nor rightfully possessed of said goods as against the defendants in the writ of attachment.

It was material evidence showing that the marshal was not a mere wrong-doer.

The court charged the jury substantially "that the action was in trespass; that the defendant offered some evidence on his part tending to show that he was marshal and possessed a writ of attachment from the United States Circuit Court for the Eastern District of Michigan against the goods and chattels of Gates and one Marler, but that evidence the court felt obliged to reject so that it is not before the jury; that if the jury were satisfied the plaintiffs were rightfully in possession of the property on the 16th of January and that at that time the defendant took possession of the goods and removed them, your verdict ought to be for the plaintiffs for the value of the goods at that time. If you find for the plaintiffs you will give the value of the goods with interest upon them as the amount of the verdict."

Defendants' exceptions to rejections of evidence and to portions of the charge and refusals to charge as requested were duly taken. The verdict of the jury was rendered for the plaintiffs under the charge

of the court as given for the entire value of the goods levied upon with interest. Judgment was duly entered thereon.

The case was carried by writ of error to the Supreme Court of the State of Michigan by the plaintiff in error and that court affirmed the judgment. By the decision of that court the work was held good upon its face, but further held that the marshal could not in his defence assail the title of defendants in error because the affidavit was insufficient.

The decision of the State Court not only holds that the United States marshal had no authority under which he could defend the suit in trespass but assumes without evidence that he had no defence applicable to a writ which the court held good on its face.

ASSIGNMENT OF ERRORS.

In the Supreme Court of the United States.

SALMON S. MATHEWS, PL'FF IN ERROR, vs. THADDEUS DENSMORE, ELISHA P. GROW, AND Dewitt Grow, def'ts in error.	Error to the Supreme Court of the State of Michigan.

Afterwards, to-wit, on the first Monday of December, before the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, comes the said Salmon S. Mathews, by Don M. Dickinson, his attorney, and says that in the record and proceedings in this cause there is manifest error, in this, to-wit:

First. The supreme court of the State of Michigan erred in sustaining the rulings of the circuit judge in his refusal to admit in evidence the writ of attachment and proceeding thereunder in the United States circuit court for the eastern district of Michigan (Exhibit D), which is as follows:

In the circuit court of the United States for the eastern district of Michigan.

STEPHEN B. SIMONS, CORNELIUS P. HATCH, & Henry C. Whitten
vs.
FRANK GATES AND THOMAS MARLER.

Circuit Court United States for the eastern district of Michigan, ss:

The President of the United States of America to the marshal of the eastern district of Michigan, greeting:

Whereas a suit has been commenced in the above entitled cause in said court, by declaration in an action of assumpsit founded on an express and implied contract, which said suit is now pending and undetermined.

You are therefore commanded to attach so much of the lands, tenements, goods, chattels, moneys and effects of Frank Gates and Thomas Marler, who are citizens of the State and residents of the eastern district of Michigan, the defendants in said suit, not exempt from execution, wheresoever the same may be found within said district, as will be sufficient to satisfy the demand of the said Stephen B. Simons, Cornelius P. Hatch and Henry C Whitten, plaintiffs in said suit, who are citizens of the State of Massachusetts, amounting, as is alleged, to the sum of five hundred dollars and upwards, over and above all legal set-offs, and safely keep the same to satisfy any judgment that may be recovered by the said plaintiffs in said suit against the said defendants. And have you then and there this writ, with return of your doings thereon, before the judge of said court, at the district court-room in the city of Detroit, on Tuesday, the 4th day of February, A. D. 1879.

Witness the honorable Morrison R. Waite, Chief Justice of the supreme court of the United States, this thirteenth day of January, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and third.

[SEAL] (signed) ADDISON MANDELL. Clerk.

Endorsed with title of cause and by J. G. Dickinson, plaintiff's attorney.

EASTERN DISTRICT OF MICHIGAN, ss.

I do hereby certify and return that I executed the within writ of attachment, on the 16th day of January, A. D. 1879, by seizing within the said district, the lands, tenements, goods, chattels, moneys, and effects of the defendants, designated and described in the inventory thereof, which is hereto annexed, and by making the said inventory, and by serving within said district a copy of such attachment and inventory, duly certified by me, upon Frank Gates, at Dansville, Michigan, in said district.

(Signed) S. S. MATHEWS,
United States Marshal.

UNITED STATES OF AMERICA, }
Eastern District of Michigan, ss. }

I, Addison Mandell, the clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true copy of the original appraisement, affidavit for writ, writ of attachment, and return of the marshal thereon endorsed, on file and of record in my office, in the cause therein entitled; that I have carefully compared the same with said original; and that it is a true copy thereof, and of the whole of said original.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Detroit, in said district, on this 4th day of October, A. D. 1879.

[Seal] (Signed) ADDISON MANDELL, Clerk.
By JNO. GRAVES, Deputy Clerk,

Inventory and appraisal of property seized by the United States marshal, under the above writ, at Dansville, Michigan, January 16th, 1879, signed by Levi Geer and Egbert Rice, appraisers, amounting in the aggregate to $819.94. (Describes goods same as those alleged in the declaration.)

In the circuit court of the United States for the eastern district of Michigan.

STEPHEN B. SIMONS, CORNELIUS P. HATCH & Henry C. Whitten,
vs.
FRANK GATES AND THOMAS MARLER.

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss.:

Julian G. Dickinson, being duly sworn, says that he is the attorney for the above named Stephen B. Simons, Cornelius P. Hatch and Henry C. Whitten, who comprise the firm of Simons, Hatch and Whitten, plaintiffs in the above entitled cause. That said plaintiffs' action in the said cause is founded upon contract express and implied, and was commenced by declaration in said court, wherein judgment has not yet been recovered; that the said declaration in said cause has been personally served upon the said Frank Gates, who is now the only existing member of said firm, the said Marler having never acted as a member of the firm of Gates & Marler, but having absconded and concealed himself ever since the purchase of the goods upon which this action is founded. And deponent further says that said defendants in the annexed writ in said cause are indebted to said plaintiffs in said writ in the sum of five hundred dollars over and above all legal set-offs, as near as this deponent can estimate the same, upon contract express and implied; that this deponent has good reason to believe that the said defendants fraudulently contracted the said debt respecting which the said suit is brought; that the said defendants have disposed of their property with intent to defraud their creditors. And further deponent saith not.

(Signed) JULIAN G. DICKINSON.

Sworn to and subscribed before me this 13th day of January, A. D. 1879.

(Signed) ADDISON MANDELL,
Com. Circuit Court U. S., E. D. of Michigan.

Second, The supreme court of the State of Michigan erred in sustaining the rulings of the circuit judge in refusing to admit evidence on the trial, offered by the plaintiff in error, in defense to the action of the defendants in error, viz: 1st, The testimony of Frederick K. Walker, Exhibit E in the record. 2nd, The testimony of Charles W. Griswold, Exhibit F in the record. 3rd, The question to witness Egbert Rice, "Didn't Gates tell you there had been such a partnership formed?" 4th, The question to witness C. L. Randall: 1. "Will you state what you saw in regard to that partnership?" 2. "Will you state whether you saw Gates advertising this partnership of Gates & Marler?" 3. "Did you see him distributing handbills of the partnership?"

Third, The supreme court of the State of Michigan erred in sustaining the charge, as given to the jury below by the circuit judge, as follows:

"If you are satisfied that the plaintiffs were rightfully in possession of the property on the 16th day of January, and that at that time the defendant took possession of the goods and removed them, your verdict ought to be for the plaintiffs."

Fourth, The supreme court of the State of Michigan erred in sustaining the refusal of the circuit judge to charge the jury according to the second request of the defendant's counsel, viz:

2. The jury is instructed to render a verdict for defendant.

Fifth, The supreme court of the State of Michigan erred in sustaining the refusal of the circuit judge to charge the jury according to the third request of the defendant's counsel, viz:

3. If the jury believe that Gates and Marler were in partnership—together in business—then they are instructed that such partnership must be deemed to continue until it is shown that such partnership came to an end. And there being no evidence that such partnership came to an end, the jury is instructed that the goods for which this suit is brought must be deemed to be the property of such partnership, and are not covered by the descriptive words of the mortgages introduced in evidence, and plaintiffs cannot recover.

Sixth, The supreme court of the State of Michigan erred in affirming the judgment of the court below, to-wit, the circuit court for the county of Eaton, in said cause.

Seventh, The supreme court of the State of Michigan erred in refusing to reverse the said judgment of the said circuit court according to the prayer of the plaintiff in error in said cause.

And the said Salmon S. Mathews prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of the said judgment.

DON M. DICKINSON,
Attorney for Plaintiff in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.

The first assignment of error presents the question of the admissability of the writ of attachment under which the United States marshal proposed to defend under the general issue.

The only grounds of objection to the writ of attachment which will here be seriously contended for by the defendants in error are contained in their following points on the trial: 1. That the affidavit does not allege or show that any sum whatever is due. 2. That the affidavit does not show that there is the sum of one hundred dollars due over and above all legal set offs. 3. The affidavit does not show that there was five hundred dollars due over and above all legal set offs, for their objections to the writ itself in matters of form were pronounced untenable by the decision of the State Supreme Court. The objections to the affidavit, as I have stated, are the basis of the affirmance by that court of the judgment in question.

The following is an abstract of the laws pursuant to which the writ of attachment issued:—

The Revised Statutes of the United States provides (sec. 915, chap .18) "In common law cases in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held, for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in

the states where they are held in relation to attachments and other process; provided, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy."

The compiled laws of the State of Michigan, fol. 11, chap. 201, page 1802, sec. (6,397) provides:

"Any creditor shall be entitled to proceed by attachment against his debtor in the Circuit Court of the county in which the creditor of or the debtor—or in case of joint debtors, either of them—shall reside, if the debtor have property subject to attachment in said county; and in case the debtor has no property in said county, or is a non-resident of this state, then in the circuit court of any county where the property of the debtor subject to attachment, may be found, in the cases, upon the conditions, and in the manner provided in this chapter."

Sec. (6398)—"Before any such writ of attachment shall be executed, the plaintiff, or some person in his behalf, shall make and annex thereto an affidavit, stating that the defendant therein is indebted to the plaintiff, and specifying the amount of such indebtedness as near as may be, over and above all legal set offs, and that the same is due upon contract, express or implied, or upon judgment, and containing a further statement, that the deponent knows or has good reason to believe, either

FIRST—That the defendant has absconded, &c., to the injury of his creditors; or

SECOND—That the defendant has assigned, &c., his property with intent to defraud his creditors; or

THIRD—That the defendant has removed, &c., his property out of this state, with intent to defraud his creditors; or

FOURTH—That he has fraudulently contracted the debt, &c., respecting which the suit is brought; or

FIFTH—That the defendant is not a resident of this state, &c,; or

SIXTH—That the defendant is a foreign corporation; provided, that such affidavit shall not be deemed insufficient by reason of the intervention of a day between the date of the jurat to such affidavit, and the issuing of the writ, and that when the person making such affidavit shall reside in any other county in this State,

than that in which the writ of attachment is to issue, one day's time for every thirty miles travel, by the usual post route, from the residence of such person to the place from which such writ shall issue, shall be allowed between the date of such jurat and the issuing of such writ."

Sec. (6432)—"That in any action founded on contract, expressed or implied, which has been or may hereafter be commenced, by summons or declaration, in any court of record in this state, the plaintiff may, at any time before judgment shall be rendered therein, proceed by attachment, in the same action, against the property of the defendent, in the manner hereinafter provided."

Sec. 6433—"At any time after said summons or declaration shall have been personally served on the defendant or defendants, or either of them, the plaintiff, or some person in his behalf, MAY MAKE AND FILE WITH THE CLERK OF THE COURT IN WHICH SUCH ACTION SHALL HAVE BEEN COMMENCED, AN AFFIDAVIT, which affidavit shall conform to be governed by the provisions of section two of chapter one hundred and fourteen of the Revised Statutes of eighteen hundred and forty-six, and being chapter one hundred and forty of the compiled laws."

Sec. 6434—"Upon filing such affidavit, said clerk shall issue a writ of attachment, which writ shall recite the commencement of said action, and shall command the sheriff to attach so much of the lands, tenements, goods, chattels, moneys, effects of the defendant not exempt from execution, wherever the same may be found in the county, as shall be sufficient to satify the plaintiff's demand, and safely keep the same, to satisfy any judgment that may be recovered by the plaintiff in such action; and such writ of attachment shall be made returnable in not less than fourteen nor more then thirty days from the issuing thereof."

Sec. (6435.-)"The subsequent proceedings by virtue of such attachment, so far as the same are not herein provided for, shall be the same as provided in said chapter one hundred and fourteen of the revised statutes of eighteen and forty-six, and the amendments thereto, so far as the same are applicable, except that no additional declaration shall be made necessary by such writ of attachment; and any jndgment recovered in the action, in favor of

the plaintiff, shall be conclusive against the defendant who shall have been personally served with the original summons or declaration; and the execution issued thereon, shall authorize the levying upon and selling of any property of the defendant so personally served, not exempt from execution, as well as the property attached, whether such attachment shall have been personally served or not."

Sec. 6438—"The issuing of said writ of attachment, and the proceedings under and by virtue of the same, shall in no manner stay the proceedings commenced by the original summons or declaration, but the defendant may, aside from the proceedings made necessary by such attachment, proceed in the cause in the same manner as though no attachment had been issued."

Sec. 6401—"Such writ shall command the sheriff, or other officer to whom it may be directed, to attach so much of the lands, tenements, goods, chattels, moneys and effects of the defendant not exempt from execution, wheresoever the same may be found within the county, as will be sufficient to satisfy any judgment that may be recovered by the plaintiff in such attachment, and such writ shall be tested and made returnable in the same manner as other writs issuing out of the Circuit Court."

Sec. 6402—"The sheriff or other officer to whom such writ shall be directed, shall execute the same on or before the return day thereof, by seizing so much of the lands, tenements, goods, chattels, moneys and effects of the defendant, wheresoever the same may be found in his county, as will be sufficient to satisfy the demands and costs, and by making an inventory thereof and serving a copy of such attachment and inventory, certified by him, upon the defendant, if he can be found in his county; and in case any property of the defendant is found and seized in said county, but not sufficient to satisfy the demands and costs, then said officer shall seize other property of the defendant, subject to attachment, sufficient with that seized within his county to satisfy the demand and costs, whenever the same may be found within the state, and shall serve a copy of such attachment and inventory upon said defendant, if found within either county where property has been seized under this writ."

Sec. 6403—"The property so attached shall be appraised by two disinterested freeholders of the county in which said property was seized, who shall first be sworn by the officer to make a true appraisement thereof, which appraisement shall be signed by such freeholders, and returned with the writ."

Sec. 6409—"The property attached shall remain in the hands of the officer serving the attachment, unless the defendant, or any other person in whose possession such property may have been found, shall, before judgment in such suit, deliver to the officer a bond, executed to him by two or more sufficient sureties, being freeholders within this state, either with or without such defendant or other person, to the satisfaction of such officer, as hereinafter provided."

Sec. 6425—"The practice in actions commenced by attachment shall be the same in all respects as in personal actions commenced by summons, as near as may be, except as otherwise provided by law."

Sec. 6427—"If any estate which shall be attached shall be subject to a mortgage, or other incumbrance, and the mortgage shall be redeemed, or the incumbrance removed, before the sale on the execution, such estate may be sold on such execution in the same manner and with the same effect as if the mortgage or other incumbrance had never existed."

Sec. 6097, of Chapter 192, 11 compiled laws, page 1741, provides: "When goods or chattels shall be pledged by way of mortgage or otherwise, for the payment of money, or the performance of any contract or agreement, such goods or chattels may be levied upon and sold on execution against the person making such pledge subject to the lien of the mortgage or pledge existing thereon; and the purchaser at such sale shall be entitled to pay to the person holding such mortgage or pledge the amount actually due thereon, or otherwise perform the terms and conditions of the pledge, at any time before the actual forclosure of such mortgage or pledge, and on such payments or performance, or a full tender thereof, shall thereupon acquire all the right, interest, and property of which the defendant in execution would have had in such goods or chattels if such mortgage or pledge had not been made."

This section applies to the levy of attachments.

King vs. Hubbell, 42 Mich., 597.

It was formerly held by the Supreme Court of Michigan that by a mortgage of chattels the whole legal title passed to the mortgagee.

Tannahill vs. Tuttle, 3 Mich., 104.

But that doctrine has been overruled and such mortgages are held to be security merely and not a transfer of title.

25 Mich., 455.
34 Mich., 360.
35 Mich., 28.
49 Mich., 602-610.

The writ of attachment in question was issued out of the Circuit Court of the United States for the Eastern District of Michigan, was signed, sealed and tested pursuant to sections 911 and 912 of Revised Statutes of the United States. The writ was in substance and in form complete, in accordance with the laws of the United States, and in conformity with the laws of Michigan.

The affidavit made on behalf of plaintiffs in the writ was filed with the clerk of the Circuit Court of the United States for the Eastern District of Michigan, in conformity with section 6433, Compiled Laws, SUPRA, and the same substantially alleged sufficient grounds, and an existing cause of action required by section 6398, SUPRA, but it was insisted in the State courts that the affidavit did not state a present due indebtedness.

It will be seen from the provisions of the Compiled Laws, section 6433, SUPRA, that the affidavit is required to conform to and be governed by the provisions of section 2, (6398) of chapter 140 (201) of the Compiled Laws, SUPRA, but it has never been required to pursue the language of the statute and it has always been held sufficient if the affidavit substantially complies with the requirements of the statute.

Wells vs. Parker, 26 Mich., 102.
Van Kirk vs. Wilde, 11 Barb. N. Y., 520.

The statement of the affidavit with reference to the indebtedness is as follows: "And deponent further says that said defendants in said cause are indebted to said plaintiffs in said writ in the sum of five hundred dollars, over and above all legal set-offs, as near as de-

ponent can estimate the same, upon contract express and implied." And this allegation is followed by the jurat, dated and executed before the United States Circuit Court Commissioner. The affidavit also expressly refers to the said contract of indebtedness as being the contract upon which the suit then pending is founded. The language is precise enough to express an indebtedness then due and payable, "That defendants are indebted."

In Blackstone Com. L., 3, p. 154, it is said the legal acceptation of DEBT is a sum of money due by certain express agreement.

Drake on Attachment, Sec. 107.
6 Peters, 29, United States vs. Bank of N. C.
15 La., R. 29, Parmlee et. al. vs. Johnston.

The writ and affidavit were not questioned or assailed in the suit and court wherein they were made.

The affidavit was no part of the writ; it was filed in the suit with the clerk of the United States Circuit Court and did not pass from his custody. Conforming to Sec. 6433, SUPRA, the writ when offered was admissable in evidence because: 1. It was a valid writ. 2. It was a good writ upon its face. (a) It was the writ under which the United States Marshal, to whom it was directed, and whom it commanded, acted. (b) It was the process of a court of competent jurisdiction to issue such writs. (c) There was nothing upon its face to apprise the officer of any insufficiency in the affidavit filed with the clerk of the court. 3. The United States Marshal was at least entitled to whatever protection such a writ would afford and warrant him in doing. It was evidence material to the issue.

Barker vs. Miller, 6 John. R, 195.
Blackely vs. Shelden, 7 Id., 32.
Spoor vs. Holland, 8 Wend., 445.
Wilbraham vs. Snow, 2 Saund. R. 47.

Without the writ the marshal was a MERE WRONG-DOER as against the defendants in the writ.

The testimony under which defendants in error maintained their action of trespass on the trial is substantially as follows:

Elisha P. Grow, one of the plaintiffs below, testified: "I made an arrangement with the owner of the building the goods were in for

the rent. The possession I had was the possession that was taken by Densmore and Grow brothers together. It was taken under the mortgages by both together at the same time. The only notice we gave of the mortgage was the bills, copy of which has been read," marked "Exhibit C." (Rec. P. 16, orig. p. 41.)

See Record, Original, p. 19.

No individual interest or possession of Frank Gates in the property was shown by the defendant in error. Thaddeus Densmore, another one of the plaintiffs below, testified: "We took possession of the goods on the second day of January." (What was the possession, and how it was taken, was not shown.) "The marshal was there two days, the 16th and 17th of January. I did not remain there all the time; was there the day the marshal seized the goods; the goods were turned over to us on the 2d of January by Mr. Gates on the mortgages which we previously had."

The mortgagss were then introduced in evidence by defendants in error and marked exhibits "A" and "B."

See Record, page 7.

The defendants in error claimed to have taken possession under and by virtue of two several mortgages respectively given them by Frank Gates ALONE IN HIS INDIVIDUAL NAME.

The defendants in error were bound to show that the property was in their possession at the time of the alleged inquiry, and that such possession was rightful as against the plaintiff in error.

2 Greenleaf Ev., sec. 316.

In the case of Haynes et al. vs. William Leppig, 40 Mich., 602, the Supreme Court of Michigan, per Campell, C. J., held: A mortgagee of chattels must prove the amount and condition of his claim if a controversy as to his rights under the mortgage arises with any one interested in questioning it. A mortgage is not actually foreclosed until the right of redemption is lost, and that can only be when there has been a sale of the property so that some one sets up a title no longer conditional. A chattel mortgage in Michigan is not a sale but only a security. The statutes favor possession by the mortgagee and under some circumstances require it. Concurrent possession of mortgaged chattels before foreclosure can be held by the mortgagee and by an officer levying execution, but the mortgagee holds only as the MORTGAGOR'S BAILEE with a special interest.

In the case of Kohl vs. Lynn, 34 Mich., 360, per Campbell, J., held: A chattel mortgage does not transfer the legal title until after foreclosure or something equivalent thereto, which must usually be by sale.

In the case of Flanders vs. Chamberlain, 24 Mich., 314, per Christiancy, C. J., held, that in the foreclosure of a chattel mortgage the mortgagee must proceed according to its terms as to notice and mode of sale.

In Harvey vs. McAdams, 32 Mich., 477, held: That A LEVY on distinct articles of mortgaged goods is NOT ILLEGAL.

Dixwell vs. Jones, 2 Dill, 184, Note.
Freeman vs. Howe, 24 How. 450.

The marshal clearly had the right to levy.

Erskine vs. Hornbuck, 14 Wall. 613.
Haffin vs. Mason, 15 Wall., 671.

The question whether there was any interest in the goods covered by the mortgages was pertinent on the trial, and the defendants in error under their own evidence were not in possession asserting title to the goods—not title by possession—not title by conveyance—not title by anything, but they simply claimed to have taken possession of the goods in controversy under the several mortgages given by Frank Gates; what interest or possession he had to mortgage to them they did not attempt to show. Was it legal, therefore, to bar out the officer from showing that as matter of fact the defendants in the writ of attachment were the owners of the property and had never parted with their possession or right of possession, nor any rights which in any way interferred with the process against their property, notwithstanding the mortgages in evidence given by one of them in his own name alone; for such mortgages could not in the absence of proof be construed as carrying the interests of the defendants Gates and Marler as partners in such property, if such property could be proved, as claimed by plaintiffs in error, to be partnership property. The gist of the action of trespass is possession, and rightful possession of the goods, and plaintiffs sought to assail defendants in error on that question.

In the case of Sieene vs. Briggs, 31 Mich., 445, the Supreme Court of Michigan per Cooley, J., held that a levy of an execution against one partner of a firm must be upon that partner's interest in the whole stock, for the only individual interest he has is his share

in what shall remain after the partnership debts are paid and the accounts between the partners adjusted.

Citing

Gibson vs. Stevens, 7 N. H., 352.
Church vs. King, 2 Conn., 523.
Brewster vs. Hammond, 4 Conn., 540.
Ex parte Smith, 10 John., 102.
Wadell vs. Cook, 2 Hill, 47.

And see to same effect:

Haynes vs. Knowles, 33 Mich., 407.

In the case of the Hubbardstown Lumber Company vs. Covert, 35 Mich., 260, the court by decision of Graves, J., say: For many purposes a firm though managed by its members is held in a sort of community but the partners do not hold as common tenants or joint tenants. The property is distinctly separated from that belonging to the individual membars, and it constitutes an identical and entire interest. The law makes distinction between debtors and creditors of the firm on the one hand and debtors and creditors of the persons composing the firm on the other. The assets are gathered, catalogued and appropriated according to these distinctions. Either partner may contract for the firm IN THE FIRM NAME.

Hutchinson vs. Dubois, 45 Mich., 143.
Gates vs. Fisk, 45 Mich., 522.
Story on Part., sec. 102.

It seems very clear that defendants in error obtained no possession or right of possession of the goods under the mortgages in evidence given by Frank Gates alone. His possession as a partner in and agent of the firm of Gates & Marler, could not be transferred. He did not profess to transfer any rights but his own. He did not mortgage as agent of the firm.

See Hutchinson vs. Dubois, 45 Mich., 143.
Haynes vs. Knowles, Supra.
Van Dyke vs. Rosskan, 65 Penn. St., 350.
Story on Part., §§ 102-135.
Clark vs. Houghton, 12 Gray, 38.
Douglass vs. Winslow, 20 Me., 89.
Perry vs. Holloway, 6 La. Ann., 265.
Shalock vs. Harmon, 6 Minn., 265.

A partner may sell out his interest in the firm to a stranger, but no such sale liberates his share from the debts of the firm.

Parsons on Part., p. 352.
Story on Part., sec. 97.

It certainly cannot be seriously claimed that one partner of a firm by a transfer or turning over of his individual rights in the firm property transfers any partnership right of partnership property, or any actual possession of such property.

As to the admissability of the testimony to show the partnership of Gates & Marler, defendants in the writ, and that the goods in question were the partnership stock, the only ground stated by defendants in error of its rejection was the absolute rejection of the writ of attachment as any evidence for the marshal, but the testimony was material and clearly admissable under the writ if good upon its face.

Parshal vs. Fisher, 43 Mich., 529.

The opinion of the State Supreme Court erroneously states that the chattel mortgages were made by Gates & Marler. The fact was undisputed by the record that both the mortgages under which the defendants in error claimed at the time of the levy, were given by Frank Gates, that they were his individual contracts for his individual debts, and if, as the marshal proposed to show, the goods were the stock of the partnership of Gates & Marler, then their scope was nothing more than a lien on Gates' interest in the property as a partner of Marler after the claims of all the firm creditors, and of his partner, Mr. Marler, were satisfied,such a lien would not sustain any possession of the firm property. Simons, Hatch & Whitten, plaintiffs in the writ of attachment, were undisputed partnership creditors; their debt against Gates & Marler was proved on the trial.

See testimony of Estabrook, Record p.

II.

Whenever the possession of a party is rightful the general rule of presumption is applied to invest that possession with a legal title.

Brown's Legal Maxims, p. 852.

Ownership of personal property once proved is presumed to continue until an alienation is shown.

Magee vs. Scott, 9 Cush. Mass., 148.

Possession of personal property even with the consent of the true owner does not raise presumption of title against such owner. Id.

In Colvin vs. Warford, 20 Md., 357, the doctrine is held that the presumption of title from possession of personal property ARISES ONLY when the possession proved appears to have been perfectly consistent with an unqualified ownership. A grant will not be presumed when the possession is explained by evidence showing that it was taken in virtue of some qualified interest less than that of an absolute title.

7 Q. B. Rep., 897.
8 East, 263.
8 Scott, N. R., 214.

The defendants in error did not attempt to show that their possession was rightful or that they had such possession at the time of the trespass alleged as against the defendants' firm, Gates & Marler, in the writ of attachment.

The marshal was precluded by the rejection of the writ of attachment from introducing any proof showing that he was not a mere wrong doer, and from putting in proof to show that Gates & Marler were in actual OR RIGHTFUL POSSESSION OF THE GOODS at the time of the levy. Proof of ownership of the goods at that time was material on that question. It was erroneous, therefore, for the trial court to charge the jury: "If you are satisfied that the plaintiffs were RIGHTFULLY in possession of the property on the 16th day of January, and that at the time the defendant took

possession of the goods and removed them, your verdict ought to be for the plaintiffs."

The testimony of the witness, Walter Griswold, as offered, Exhibits 'E' and 'F,' and questions to witnesses Rice and Randall, pp. 10 and 11, were to show the fact of the partnership existing between Gates & Marler, the defendants in the writ; that the business carried on and the goods in question were in fact in possession of and belonged to such partnership. There was no dispute as to the tendency of the proof offered to show that fact, but the testimony was ruled out on the ground that it was immaterial, because the marshal had no writ in evidence.

There was testimony introduced on the trial to show the partnership of Gates & Marler, and that the goods in question was partnership stock.

The trial court inquired whether testimony offered was for the purpose of proving the partnership and thereupon excluded it.

Record, p. 11, Orig. p. 27.

It was a correct legal proposition to charge the jury as requested by the counsel for the plaintiff in error, that if the jury found such a partnership, then it must be deemed to have continued, and there being no evidence that such partnership came to an end, the goods must be deemed to be the property of such partnership and not covered by the descriptive words of the mortgages in evidence.

Irby vs. Bingham, 9 Humph., Tenn., 750.
Schmidlapp vs. Currie, 18 Law Reg., 108.
Story on Part., sec. 102 and Note.
Hubbardston Lumber Company vs. Covert, 35 Mich., 254.

In the case of Watkins vs. Wallace, 19 Mich., 57, the Supreme Court, per Campbell, J., held: Wallace being general assignee of Morrison, Watkins, as sheriff, levied upon a portion of the assigned property under an execution against the ASSIGNOR, claiming the assignment to be void as against creditors. This is an action of trespass brought by the assignee against the sheriff for the seizure. Judgment was recovered against the sheriff. A preliminary question is suggested upon the record

whether the sheriff had such process as would justify him. Had it been irregular the excution BEING IN DUE FORM WOULD PROTECT THE SHERIFF FROM BEING A TRESPASSER.

Citing People vs. Rix, 6 Mich., 144.

It will be seen that in Watkins vs. Wallace, the assignee of the defendant in the writ was the party assailing the officer, claiming under an assignment which the officer claimed was fraudulent.

This case was relied upon below by defendants in error but it does not sustain their position.

In the case of Beach vs. Botsford, 1 Doug., Mich., per Morell, C. J., after reviewing and analyzing the case of Savacool vs. Boughton, 5 Mich., 170, and all the leading cases on the subject of protection to an officer under process which is fair on its face, held: These cases establish the principle that a ministerial officer is protected by process which is fair on its face, although the magistrate wanted jurisdiction, if he is proceeded against as a TORT FEASOR. The case was an action of replevin and the proceedings are IN REM. The person found in possession of the property is not called upon to respond in damages as a trespasser for the value of the property. He is merely summoned to appear and answer the plaintiff for the unjust detention of the property. The issue to be tried is, who had the right of property. The question does not arise whether the defendant was a trespasser or not.

Erskine vs. Hornback, 13 Wall., 613.
Blalock vs. Randall, 76 Ill., 224.
Wall vs. Trumbull, 16 Mich., pp. 233 224.

In the case of Cook vs. Harper, 23 Mich., 511, the action was trespass against the sheriff, plaintiff and attorney in writs of attachment. The writs were admitted in evidence for the defendants, but no proof was introduced showing the fact of the indebtedness alleged in the affidavits for the writs. The court held that proof of indebtedness of the defendant in the writ to plaintiff should have been made to warrant the defence of the officer against the claim of property in the plaintiff.

The case of Martin vs. Podger, et al., 2 Wm. Bl. Rep., 701, was a case where a sheriff was sued in trespass for seizing under

execution certain goods which he claimed to be property of defendant in the writ. He was sued by a third person who showed title. The sheriff on the trial was permitted to produce the writ in evidence, but having failed to produce a copy of the judgment, the question was presented whether it was necessary to prove the judgment. In deciding the case, Lord Mansfield, chief justice, said that it was necessary to prove the judgment where third persons bring actions and defendant justifies under writ of execution, but as the goods were in possession of the son, the judge should have left to the jury whether, under these circumstances, the father had any right to recover. Afterwards cause was shown on motion for new trial, viz.: that the possession of the bill of sale was good against all but creditors, and that as no judgment was produced there was no proof of any BONA FIDE debt due to plaintiff in the execution. But the court were unanimous that the judge ought to have left it to the jury upon the ground of fraud, and made the rule for new trial absolute.

The case of Eastman vs. Holmes, 5 Hill, N. Y., Rep. 194, one of the cases relied upon by defendants in error was an action of REPLEVIN against the sheriff, and the court held: "That the defendant must show an attachment regularly issued. If Latin, defendant in the attachment, had sued it would be enough for the defendant to produce the attachment, but it is otherwise as against the plaintiffs who are strangers to the attachment and claim under an older title, unless it be impeached for fraud."

The case of Horton vs. Hendershot, 1 Hill, N. Y., Rep., was an action of trespass by an officer against another officer, both claiming the property under void attachments which were, however, good upon their face. The court held that the plaintiff could not maintain the action because he could not build up a title. The plaintiff levied first and the defendant took the property out of his possession, yet the court held that the plaintiff not having a valid process could not recover against the defendant, who also had the property by invalid process.

In the case of Earle vs. Camp & Stowe, 16 Wend., 562, the court held substantially the same doctrine. The plaintiff, an officer, sued in trespass for goods held by him under void processes good on their face, which were taken out of his possession by the defendant under void process. It was held that the officer under void process

is not to be sustained in whatever actions he may bring, but is allowed a complete protection against the action of trespass. This is pursuant to the doctrine that trespass cannot be maintained by one who has a mere tortious occupancy.

In the case of English vs. Russell, 1 Hempst., 34, the court held that trespass would not lie against an officer who acted upon a regular writ where the subject matter is within the jurisdiction of the magist rate who issued the writ and it was regular on its face.

In the case of Sharpe vs. Doyle, 102 U. S., Rep. (12 Otto) 688, the Supreme Court of the United States, in the decision by Mr. Justice Miller, held: "It is true that in a case of naked trespass without claim of right in the tresspasser, the possessor of the goods may recover without regard to the state of the title. But such is not the case here. The defendant acted under a lawful writ from a court having jurisdiction to issue it. But the Court of Appeals of the state of New York, 'said you shall not be permitted to prove that; if the plaintiffs show that they were in possession asserting ownership you will not be allowed to contradict that assertion.' Such a proposition is opposed to all the analogies of the law."

In the case of Buck vs. Colbath, the Supreme Court of the United States decided that the marshal can be sued in trespass by third parties, but this court has not decided that the marshal shall not be protected by his writ, and if deprived of that protection erroneously by the state court, by reason of questions as to the force and validity of the writ, the Supreme Court of the United States has jurisdiction to correct the error.

The principle applicable to the seizure of goods by an officer under process issued by a court of competent jurisdiction is that the property, when seized by the officer of such court is in CUSTODEA LEGIS, that the possession of the officer is the possession of the court.

Freeman vs. Howe, 24 How., 450.
Buck vs. Colbath, 3 Wall., 355.

The title not coming in question in the first instance when the right of possession merely is contested, there is nothing to prevent a claimant from going into the court whose jurisdiction has first attached as an intervenor in the case, and there establish if he can,

paramount title to the property. The practice in some of the United States Circuit Courts under this rule has been to issue writs of replevin upon petition of claimants to property seized by the marshal under mesne process from such courts.

Buck vs. Colbath, Supra.

It is undoubtedly a fundamental rule upon the subject of showing title in actions EX DELICTO, that as against a mere WRONG-DOER or person apparently having no color of right mere possession suffices, and a special statement of title in the declaration is not necessary.

But the marshal with a writ fair upon its face is not a mere WRONG-DOER, he has color of right if he can show that as a matter of fact he levied upon goods the property of the defendants in the writ; that he is pursuing the command of the court to levy upon the property of the defendants in the writ wherever it may be found, and it is his only defence in any action brought against him that the property levied upon is the property of the defendants or such property as is subject to levy as of the property of the defendants; such proof tends to show that such defendants are possessed of the property.

While it is true that the defendants in error might have made a PRIMA FACIE case by proof that they were in actual possession, yet the marshal should be permitted to rebut the PRIMA FACIE case by such evidence as he might be able to produce and did produce on the trial, negativing not only the fact of plaintiffs' possession but their right to possession as against his right to levy.

In the order of proof his first step was to show his writ; his second to show that the property was subject to levy as the property of defendants in the writ.

In the action of trespass the right of property is not in issue and is not determined by the judgment, but only the rightfullness of the possession of the property.

Therefore, if the right of property is not involved and cannot be decided by such action, there is no foundation for applying in this action the rule of law applicable to the actions of replevin and trover, where the right of property is the issue and finally determined by the judgment.

Adams vs. Hubbard, 30 Mich., 104.
Beach vs. Botsford, Supra.

If the writ of attachment had been admitted in evidence and the marshal permitted thereunder to show the facts as to possession, ownership, or interest in or right of possession to the goods in question, such evidence would have had a material bearing on the question whether he was a wrong-doer.

Therefore it is respectfully submitted by the plaintiff in error that the State Supreme Court should not have sustained the rejection of the writ of attachment and other evidence offered by plaintiff in error, and should not have affirmed the judgment of the trial court below, but should have reversed that judgment and granted to plaintiff in error a new trial, and should have sustained the exceptions referred to so that plaintiff in error might be permitted to defend under his writ of attachment, either as a valid writ or as a lawful writ, good upon its face, which the State Supreme Court at least decided was the case against the rulings of the trial court below, refusing, however, to grant a new trial which in effect, deprived the marshal of the right to introduce the writ in evidence in his own defense.

DON M. DICKINSON,
Attorney for Plaintiff in Error.

109-216

OFFICE SUPREME COURT U.S.
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BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

SUPREME COURT OF THE UNITED STATES.

NO. 303.

SALMON S. MATTHEWS, PLAINTIFF IN ERROR,

VS.

THADDEUS DENSMORE, ELISHA P. GROW AND DEWITT GROW, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

O. M. BARNES,
Attorney for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

NO. 303.

SALMON S. MATTHEWS, PLAINTIFF IN ERROR,

VS.

THADDEUS DENSMORE, ELISHA P. GROW AND DEWITT GROW, DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

This is an action of trespass brought by the defendants in error in the Circuit Court for the County of Ingham and State of Michigan for the taking of the goods mentioned in the declaration.

Defendant Densmore held a mortgage on the goods, given by one Frank Gates, who was in possession, for $3,000.00, given October 21st, 1878, which was the first lien.

Defendants Elisha P. and Dewitt Grow held a mortgage on the same goods, given by Frank Gates October 21st, 1878, subject to Densmore's mortgage, for $2,307.85.

On the 2d day of January, 1879, default having been made in the payment of both of these mortgages, and Gates being unable to pay, the goods were taken on the mortgages by the defendants in error, and were turned over by Gates to them, and it was agreed between Densmore and the Grows that they would seize and hold the stock jointly, and should share in the proceeds after a manner agreed upon between them.

From the 2d day of January, 1879, the defendants in error continued in possession of the goods at the store in Dansville,

selling from them at retail, in the ordinary way, until the 17th of January, 1879, when the plaintiff in error entered the store and took from the stock the goods in controversy, and boxed them up and took them away, and this action was brought against him.

The defendant (plaintiff in error) claims that Gates, on or about the 1st day of October, 1878, formed a co-partnership with one Marler, and that the stock of goods became the property of Gates & Marler, (which was denied by the defendants in error.)

On the 4th day of October, 1878, Messrs. Simons, Hatch & Whitten, of Boston, sold to Gates & Marler a bill of goods, amounting to $452.90, on four months' time, (see Record, page 15) and in January, 1879, commenced suit in the United States Court for the Eastern district of Michigan, against Frank Gates and Thomas Marler, and on the 13th day of January, 1879, filed in said Court an affidavit for an attachment under the statute, Compiled Laws of the State of Michigan for 1871, page 1810, averring that the defendants, Gates & Marler, were indebted to the plaintiffs (Simons, Hatch & Whitten) in the sum of five hundred dollars, etc., but not averring that anything whatever was due, (see Record, affidavit on page 19) and thereupon a writ of attachment was issued; the affidavit attached thereto; and delivered to the plaintiff in error, who was United States marshal for the district, who thereupon seized the goods in controversy and removed them to Detroit.

The defendant (plaintiff in error) pleaded the general issue and gave notice of justification under these proceedings.

On the trial the plaintiffs (defendants in error), to make the case on their part, proved that they were in possession of the goods in controversy, that the defendant took them from their custody and removed them, and their value.

The defendant then proved that he was United States marshal of the district, and offered in evidence the writ and affidavit, which were objected to and excluded. (See Record, page 9.) The defense offered testimony tending to show that Gates formed a co-partnership with Marler, for the purpose of showing that the goods belonged to Gates & Marler and that therefore Gates could not convey them to plaintiffs, (defendants in error) (see Record, page 11,) which was

objected to upon the ground that defendant had not connected himself with their title, if they had any. The objection was sustained and the testimony excluded.

The defense asked the Court to instruct the jury that the plaintiffs could not maintain the action jointly, that their interests, if anything, were several, which was refused.

Judgment having passed for the plaintiffs (defendants in error) the defendant (plaintiff in error) removed the case to the Supreme Court of the State of Michigan, where the judgment was affirmed (see opinion by Judge Cooley commencing on page 2 of Record) and the plaintiff in error now brings the case to this Court by writ of error under section 25 of the judiciary act as amended.

I.

Does the Record present a case within the 25th section of the judiciary act?

The writ of attachment offered in evidence by the Marshal, though issued by a United States Court, was nevertheless issued pursuant to the statutory provisions of the State of Michigan. The objections made to it were all based upon these statutory provisions; and this presented to the Court for decision only questions relating to the proper construction of the statutory provisions of the State of Michigan, without which the writ held by the Marshal could not have issued and upon which his whole right depended.

Mich. R. R. Co. vs. Mich. S. R. R. Co., 19 How., 378.

II.

The case involved no conflict between the State and United

States Courts. The Marshal's possession of the goods seized upon his writ was in no way interfered with. He was only sued in trespass for an unlawful taking.

1 Abbott's U. S. Prac., 226.
Buck vs. Colbath, 3 Wall., 334.

III.

But if the case does come within the 25th section of the Judiciary Act, then the only question open for discussion in this Court is whether the Court properly excluded the writ of attachment as invalid. No other questions involved in the case can be important.

Latter clause of 25th Sec., Judiciary Act.
Klinger vs. Missouri, 13 Wall., 263.
Mackay vs. Dillon, 4 How., 421.
Murdock vs. City of Memphis, 20 Wall., 591.

IV.

The questions relating to the admissibility of the writ of attachment depended upon the requisites and proper construction of the statute laws of Michigan and upon these questions the decisions of the Supreme Court of that State will constitute the rule of decision here.

1 Abbott's Pr., 179–180.
1 Abbott's Pr., 234–235.
Judiciary Act, Sec. 34.

V.

Did the State Court err in excluding the writ of attachment

offered by the plaintiff in error (the marshal) by way of justification?

(a) The statute under which this attachment was issued—(2 Comp. L. of Mich., p. 1810, §6433) requires the affidavit to conform to Ch. 140, Comp. L. 1857, being 2 Comp. L. 1871, p. 1801–2.

(b) The affidavit was fatally defective, as it failed to state that anything whatever was *due* to the Plaintiffs.

Cross vs. McMaken, 17 Mich., 511.
Wells vs. Parker, 26 Mich., 102, which were followed in the present case.
Matthews vs. Densmore, 43 Mich., 463.
Hale vs. Chandler, 3 Mich., 531.
Fessenden vs. Hill, 6 Mich., 242.

(c) The Supreme Court of Michigan has repeatedly held that an affidavit which does not conform to the statutory requirements is utterly void. That the defect is jurisdictional, is not amendable, and that the proceedings may be questioned in any collateral proceedings, where a benefit is claimed under them.

Greenvault vs. Farmers and Mech. Bank, 2 Doug., 498.
Wilson vs. Arnold, 5 Mich., 98.
Drew vs. Dequindrie, 2 Doug., 92.
Hale vs. Chandler, 3 Mich., 531.

(d) But it is said the writ was fair upon its face, and justified the marshal in obeying its command to seize the goods of Gates & Marler.

(1) This is a rule of protection only.

1 Waterman on Trespass, §467.
Beach vs. Botsford, 1 Doug. (Mich.), 199.
LeRoy vs. East Saginaw R. R., 18 Mich., 233.

(2) The writ though fair on its face is no protection when the officer is sued by a stranger to the writ.

1 Waterman on Trespass, §467.
2 Hilliard on Torts (4th edition), 135-6-7 and note.
Rosenbury vs. Angell, 6 Mich., 508.
Cook vs. Hopper, 23 Mich., 511.
High vs. Wilson, 2 John., 45.
Rinchey vs. Stryker, 28 N. Y., 45.

(3) As stated by the Supreme Court of Michigan in its opinion rendered in this case, (43 Mich., 461,) this rule was understood by the marshal who undertook to comply with it.

VI.

By reference to the Michigan statutes before referred to, it will be seen that these statutes are of that class where the officer issuing the writ only acts *ministerially*. All that is required is that the affidavit must state simply the existence of particular facts declared by the statute to be grounds of attachment, and upon filing the affidavit with the clerk, he issues the writ. No preliminary hearing is had. The facts are not required to be shown to the satisfaction of any officer. No officer is required to be satisfied of the existence of the facts.

Drake on Attachments (3d Edition,) Sec. 97-98-99-100.
Drake on Attachments (3d Edition,) Sec. 86.

It is the universal rule that under statutes of this class,

when the affidavit does not show the facts required by statute the writ is absolutely void, and may be attacked collaterally in any proceeding in which they are involved.

Drake on Attachments (3d Ed.,) Sec. 83 to 88 inclusive.

VII.

All the testimony offered by plaintiff in error which was excluded, and of which complaint is made, was offered for the purpose of showing that the property belonged to the defendants in the attachment suit, and not to defendants in error who were in possession. If the writ was properly excluded, then of course this evidence was immaterial, as the marshal thereby failed to connect himself with the title of the defendants in the attachment, and defendants in error being in possession, claiming title which was good as against defendants in attachment.

VIII.

This cause was decided and the exclusion of the writ of attachment held by the marshal affirmed by the Supreme Court of Michigan, in accordance with the well established construction of the statute in question under which the writ in question was issued, as stated in repeated decisions of that Court. No discrimination has been made against the Federal Courts, and I submit that the judgment should be affirmed.

The defendants in error were not parties to the attachment suit and were not impleaded therein. They could not have appeared in that action and taken advantage of the defective affidavit, and if they cannot question it in this suit, they are powerless to question it at all, and the result would be that a